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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ANTONIO FIASCHE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Boyd v. United States*, 116 U.S. 616, 635 (1886), Mr. Justice Bradley, while assaying Fourth Amendment protections, explained: "It is the duty of courts to be watchful for the constitutional rights of its citizens, and against any stealthy encroachments thereon. Their motto should be *obsta principiis.*" Ital. in original.

1. Whether the holding in *Brigham City, Utah v. Stuart*, 547 U.S. 398 (2006), authorizing warrantless entries while coming to the aid of endangered home occupants, abrogates the Fourth Amendment's "probable cause plus exigent circumstances" doctrine, as settled by the Court's pre-*Brigham City* cases, and now sanctions warrantless entries into a citizen's home or enclosed backyard by DEA agents hoping to find drugs, where the purported emergency principally involves hearing an otherwise undefinable "swishing" sound from petitioner's enclosed backyard?

A. Whether federal agents can circumvent Fourth Amendment warrant protections by creating "knock and talk" exigent circumstances to justify the warrantless entry into a citizen's home?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF APPENDICES	iii
TABLE OF CITED AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTION, STATUTES AND RULES	2
STATEMENT	3
REASONS FOR GRANTING THE PETITION	12
CONCLUSION	25

TABLE OF APPENDICES

Page

Opinion Of The United States Court Of Appeals For The Seventh Circuit Decided March 21, 2008 1

Judgment Of The United States Court Of Appeals For The Seventh Circuit Dated March 21, 2008 12

Order Of The United States Court Of Appeals For The Seventh Circuit Denying Petitions For Rehearing And Rehearing En Banc Dated May 9, 2008 13

Memorandum And Order Of The United States District Court For The Northern District Of Illinois, Eastern Division Dated March 10, 2006 15

Opinion Of The United States District Court For The Northern District Of Illinois Denying Reconsideration Dated April 5, 2006 38

TABLE OF CITED AUTHORITIES

Page

CASES

Boyd v. United States,
116 U.S. 616 (1886) i

Brigham City, Utah v. Stuart,
547 U.S. 398 (2006) ..... *passim*

Byars v. United States,
273 U.S. 28 (1927) 16

Johnson v. United States,
333 U.S. 10 (1948) ..... *passim*

Kirk v. Louisiana,
536 U.S. 635 (2002) 15, 22

Koch v. Brattleboro,
287 F.3d 162 (2nd Cir. 2002) 19

McDonald v. United States,
335 U.S. 451 (1948) 13, 14, 23, 24

Mincey v. Arizona,
437 U.S. 385 (1978) 13

Payton v. New York,
445 U.S. 573 (1980) 14, 15, 22, 23

Sira v. Morton,
380 F.3d 57 (2nd Cir. 2004) 17

Cited Authorities

Page

Spinelli v. United States,
393 U.S. 410 (1969) 13

United States v. Blount,
123 F.3d 831(5th Cir. 1997) 15-16

United States v. Chambers,
395 F.3d 563 (6th Cir. 2005) 23

United States v. Coles,
437 F.3d 361 (3d Cir.2006) 21, 23

United States v. Collazo,
732 F.2d 1200 (4th Cir.1984) 21

United States v. Collins,
510 F.3d 697 (7th Cir. 2007) 16

United States v. Duchi,
906 F.2d 1278 (8th Cir.1990) 21

United States v. Gaitan-Acevedo,
148 F.3d 577 (6th Cir. 1998) 16

United States v. Gibson,
928 F.2d 250 (8th Cir. 1991) 17

United States v. Goree,
365 F.3d 1086 (DC Cir. 2004) 16

Cited Authorities

Page

United States v. Gould,
364 F.3d 578 (5th Cir.2004) 21

United States v. Holloway,
290 F.3d 1331 (11th Cir. 2002) 19

United States v. Mendonsa,
989 F.2d 366 (9th Cir. 1993) 17

United States v. McCraw,
920 F.2d 224 (4th Cir.1990) 21

United States v. McGregor,
31 F.3d 1067 (11th Cir.1994) 21

United States v. Morgan,
743 F.2d 1158 (6th Cir. 1984) 23

United States v. Mowatt,
513 F.3d 395 (4th Cir. 2008) ..... *passim*

United States v. Paul,
808 F.2d 645 (7th Cir.1986) 21

United States v. Rasor,
599 F.2d 1330 (5th Cir. 1999) 17

United States v. Reeves,
524 F.3d 1161 (10th Cir. 2008) ..... *passim*

Cited Authorities

Page

United States v. Snipe,
515 F.3d 947 (9th Cir. 2008) ..... *passim*

United States v. Tibolt,
72 F.3d 965 (1st Cir. 1995) 16

United States v. Troop,
514 F.3d 405 (5th Cir. 2008) 21

United States v. Turner,
650 F.2d 526 (4th Cir. 1981) 15

United States v. Vega,
221 F.3d 789 (5th Cir. 2000) 23

United States v. VonWillie,
59 F.3d 922 (9th Cir. 1995) 16

United States v. Weaver,
99 F.3d 1372 (6th Cir. 1996) 17

Welsh v. Wisconsin,
466 U.S. 740 (1984) 14, 15

Whiteley v. Warden,
401 U.S. 560 (1971) 16

Cited Authorities

Page

CONSTITUTION, STATUTES AND RULES

United States Constitution, Fourth Amendment ..... *passim*

18 U.S.C. § 3231 1

28 U.S.C. § 1291 1

28 U.S.C. § 1254(1) 1

Fed. R. Crim. P. 41(d)(3)(A) 2, 3, 16, 24

OTHER AUTHORITIES

4 LaFave, Search and Seizure, § 6.5(b) (2004) 24

Antonio Fiasche (petitioner or Fiasche), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion and judgment of the United States Court of Appeals for the Seventh Circuit was filed on March 21, 2008 and is cited at 520 F.3d 694. App. 1-12. Fiasche's rehearing petition was denied on May 9, 2008. App. 13-14. The March 10, 2006, district court memorandum opinion rejecting petitioner's suppression motion is unreported. App. 15-37. On April 5, 2006, the district court denied suppression reconsideration. App. 38.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Seventh Circuit was entered on March 21, 2008. App. 1-12. Petitioner's timely rehearing petition was denied on May 9, 2008. App. 13-14. The Court of Appeals for the Seventh Circuit had jurisdiction pursuant to 28 U.S.C. § 1291, and the United States District Court for the Northern District of Illinois, Eastern Division, had jurisdiction pursuant to 18 U.S.C. § 3231.

This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTION, STATUTES AND RULES

U.S. Constitution, Fourth Amendment.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fed. R. Crim. P. 41(d)(3)(A) states:

> (3) Requesting a Warrant by Telephonic or Other Means.
>
> > (A) In General. A magistrate judge may issue a warrant based on information communicated by telephone or other reliable electronic means.
> >
> > (B) Recording Testimony. Upon learning that an applicant is requesting a warrant under Rule 41(d)(3)(A), a magistrate judge must:
> >
> > > (i) place under oath the applicant and any person on whose testimony the application is based; and
> > >
> > > (ii) make a verbatim record of the conversation with a suitable recording device, if available, or by a court reporter, or in writing.

(C) Certifying Testimony. The magistrate judge must have any recording or court reporter's notes transcribed, certify the transcription's accuracy, and file a copy of the record and the transcription with the clerk. Any written verbatim record must be signed by the magistrate judge and filed with the clerk.

(D) Suppression Limited. Absent a finding of bad faith, evidence obtained from a warrant issued under Rule 41(d)(3)(A) is not subject to suppression on the ground that issuing the warrant in that manner was unreasonable under the circumstances. West 2007.

STATEMENT

1. INTRODUCTION

The centerpiece of this petition involves Fourth Amendment issues involving "exigent" circumstances where, during the afternoon of September 2, 2005, the government never contended that the Drug Enforcement Agents (DEA) agents' warrantless entry into petitioner's enclosed backyard and home resulted from objective concerns regarding the health, safety or welfare of any home occupant. Rather, the government successfully contended below that the warrantless entries into petitioner's backyard and home were justified because of "exigent" circumstances relating to an ongoing drug investigation. Several DEA agents went to the front of petitioner's home to execute [a]

"knock and talk." DEA Agent Oko went to the side of petitioner's single story brick ranch home–near a closed gate leading into the backyard. Agent Oko, after hearing an otherwise undefined "swishing" sound from the backyard, opened the gate and ran into petitioner's backyard. After seeing nothing of investigative significance, Agent Oko remained in the backyard and walked up two or three patio stairs. From that vantage point he heard [a] toilet flushing. He remained where he was, and after a minute or so, heard another toilet flush. Thereafter, he and other agents immediately entered petitioner's home through [backyard] patio doors. The government conceded below that petitioner's enclosed backyard was, for Fourth Amendment purposes, "curtilage."

2. SUMMARY OF DISTRICT COURT PROCEEDINGS

On October 25, 2005, petitioner and co-defendant, Antonio Vitagliano (Vitagliano), were charged by a federal grand jury in Chicago with drug related offenses. R. 24. Both filed motions to suppress physical evidence and on March 10, 2006, following evidentiary hearings, the district court rejected suppression. R. 30, 33-36, 50-51. App. 15-37. Thereafter, petitioner entered a guilty plea, reserving his right to challenge the adverse district court suppression rulings. R. 81-82. On December 12, 2006 petitioner was sentenced to eighty-seven months in custody. R. 100. Petitioner is in custody pending disposition of this petition.

3. DISTRICT COURT SUPPRESSION HEARING–JANUARY 27, 2006

On August 25, 2005, Lars Bjerga (Bjerga) was arrested in Kentucky for possessing ten pounds of marijuana. Suppression Tr. of 1/27/06, at Tr. 5, 8, 11-12. Post-arrest, Bjerga informed Kentucky police that he secured the marijuana from "Tony," who lived in the Chicago area, in a brick ranch home with a fenced-in backyard. Bjerga also maintained that he recently delivered approximately $134,000 to Tony's home. After providing the police with phone numbers for "Tony," Bjerga stated that "Tony" and another man, driving a Lexus or a rented car, were taking $500,000 to New York on either September 2 or 3, 2005. *Id.* at 5-6, 86, 218-19.

During the morning of September 2, 2005, Louisville, Kentucky DEA contacted Chicago DEA and provided Bjerga's information. Chicago DEA Agent Jennifer Traud tracked one of the phone numbers and ascertained petitioner's Chicago address. She shared the information with her supervisor, and several agents were dispatched to petitioner's home around noon on September 2, 2005. *Id.* at 5-6. Shortly after the agents took surveillance positions, two of the agents followed petitioner as he drove to a local chiropractor and then to a hospital. *Id.* at 16-17. Petitioner returned home around 1:30 p.m. *Id.* at 166.

In the meantime, a car driven by Vitagliano had parked in petitioner's driveway. Vitagliano, accessing an electronic keypad, opened petitioner's garage door and (apparently) entered the home. *Id.* at 164, 166, 259. Shortly after petitioner returned home, Vitagliano drove

away carrying a white box and brown paper bag. *Id.* at 84, 167, 260. Vitagliano was followed for several miles and was stopped by federal agents. The proffered suppression reasons for stopping the car included eratic driving, speeding, and Vitagliano (possibly) "making" the agents and using a cell phone. A search of the brown paper bag and white box revealed approximately 200 Ecstacy pills and a cell phone. *Id.* at 22-25, 87-89. However, the official DEA-6 reports failed to detail the proffered testimonial reasons for stopping Vitagliano's car. *Id.* at Tr. 69-70, 79, 122. Moreover, regarding the nature of the investigation–it was based on "money" movement, *not narcotics*. *Id.* at Tr. 99 (petitioner's emph.).

4. SUPPRESSION TESTIMONY REGARDING THE WARRANTLESS ENTRY AND SEARCH OF PETITIONER'S HOME DURING THE AFTERNOON OF SEPTEMBER 2, 2005

DEA Agent Oko testified that he was outside petitioner's home conducting surveillance, and when he arrived Vitagliano's silver Chevy Malibu had just pulled into the driveway. Suppression Tr. of 1/27/06 at Tr. 128-29. Around 2:30 p.m. he and other agents approached the front of the home–but since there were enough agents in the front–he went to the side to make sure nobody left the side door while agents in the front were attempting a "knock and talk." Agent Oko understood that the DEA information was someone would be leaving the home with a large amount of money, and an earlier traffic stop resulted in the seizure of Ecstacy pills–and the individual stopped had exited petitioner's home carrying a box. Tr. 129-33.

As Agent Oko was lingering at the side of the home he heard a "swishing sound"–not a bang–but loud enough to grab his attention. He ran to the back area of the home while the agents were in front just beginning "to knock." Agent Oko ran to the gated area, opened the gate and ran into the backyard. At that time he saw a back door and porch–nothing remarkable. *Id.* at 133-34. The reason he went into the backyard was to investigate the noise he heard–but he saw no one in the backyard. However he saw open patio doors and a torn/shredded screen. He "perceived" that someone ran out of the house through the screen door and jumped the fence–that's what he was thinking. *Id.* at 136-37. He approached the patio doors to investigate the tattered screen and heard a flushing sound when he was two or three feet from an open window; he heard nothing else at that time. *Id.* at 137-39. When DEA Agent Fernandez came into the backyard, Agent Oko told her about the toilet flushing and she returned to the front. Within a minute or two he heard another flush and "that was it" . . . he waited for the other agents and they entered petitioner's home through the rear patio doors. *Id.* at 139-40. Agent Oko maintained that he entered the home because he thought someone was destroying evidence. *Id.* at 141. Post-warrantless entry, a search of the home revealed petitioner (no one else) along with drugs and U.S.C. Petitioner was immediately arrested. *Id.* at 142-44, 207-09.

Under cross-examination, Agent Oko explained that part of DEA enforcement procedure includes executing "knock and talk," where they attempt to speak to an individual and get consent to search. Because there were five agents at the front, he decided to move to the side.

They had been on surveillance for a couple of hours, and during that time no one was seen walking around the property and there was a fairly high stone fence around the property. *Id.* at 148-49.

Agent Oko explained that he did not hear the front door "knock," but he heard a "loud swish," it was not a bang and he could not really explain the noise; it caused him to go running into the backyard area–it was loud enough to get his attention. *Id.* at 149-51. When he ran into the fenced in area no one was there, but he thought somebody made it over a rear wooden fence. However, he didn't chase anyone, yell out for help, or communicate with other agents in connection with what he thought was a fence-jumper. When Agent Fernandez came into the back he did not tell her he thought someone "jumped" the fence. *Id.* at 153-54. Agent Oko conceded that he had not heard any flushing sounds until he went up the three or four patio steps which led to the patio screen doors. *Id.* at 155. When he heard the flushing sounds, separated by a minute or two, he did not yell anything through the screen door such as "police." *Id.* at 155-56. When Agent Oko heard the first flushing sound–he made the "determination" *that they were going to go into the home. Id.* at 156 (ital. emph. added). Moreover, at the time of entry there was no odor of marijuana or any such thing, and before entering petitioner's home there was no contraband that he had seen–and there was *no information regarding anyone being armed or dangerous. Id.* at 157-58 (ital. emph. added). DEA Agent Amelia Fernandez testified that she and other agents arrived at petitioner's home at about 12:50 p.m.; at about 1:15 she saw Vitagliano's car pull into the driveway. *Id.* at 163-64. She noted there were

two cars in the driveway at the time, Vitagliano then went into the garage. Fifteen or twenty minutes later petitioner's Lexus pulled into the garage and several minutes later Vitagliano left carrying a box and brown paper bag. *Id.* at 165-68.

After a "knock and talk" plan was reached in the hope of getting petitioner's consent for the search of his home, she left the front and went into the backyard through an open gate because Agent Oko was alone. She saw Agent Oko at the patio landing and he related he heard "flushing" and requested that she tell the agents in front what he heard. *Id.* at 166-69. She ran to the front, alerted other agents about the "flushing," and stayed at the front while the others ran to the rear. *Id.* at 170.

Additional suppression witnesses included DEA Agent Todd Arthur and Group Supervisor Kenneth Walter. Agent Arthur again described "knock and talk," and the events involving the arrest of Vitagliano. *Id.* at 195-200. After entering the home, petitioner was arrested and a subsequent [consent] search revealed drugs and U.S.C. *Id.* at 207-09. DEA Agent Traud was recalled and testified that the decision to approach petitioner's home occurred at about 2:30 p.m. *Id.* at 220. She attempted to clarify the time line regarding Bjerga–he was arrested in Kentucky on August 25 and on September 2nd apparently Bjerga's lawyer provided the money-moving information. *Id.* at 222-26. Further testimony disclosed that Bjerga spoke with petitioner on September 1st, and during that phone conversation petitioner wanted Bjerga to return to Chicago and drive the "money" to New York. *Id.* at 234-35.

5. SUPPRESSION HEARINGS CONTINUED ON FEBRUARY 1, 2006

The February 1, 2006, hearing related to Vitagliano's motion to suppress evidence seized from his car after being stopped by DEA agents during the afternoon of September 2, 2005. His suppression motion and testimony provided the basis for his motion (stopped without probable cause). Suppression Tr. of 2/1/06 at Tr. 249-59. Vitagliano testified, *inter alia*, that he did not provide oral consent to search his vehicle or the white box/paper bag. Government rebuttal witnesses testified that he was stopped because the composite circumstances, including speeding, eratic driving, and the purported use of a cell phone while he was being pursued justified the stop. Further, the rebuttal witnesses testified that Vitagliano provided oral search-consent. *Id.* at 277-78, 298, 315.[1]

6. THE DISTRICT COURT'S MARCH 10, 2006, OPINION DENYING SUPPRESSION AND THE SEVENTH CIRCUIT SUPPRESSION-DENIAL AFFIRMATION

In advance of the district court's suppression decision, briefs were filed in support and opposition of suppression. Importantly, the government's February 23, 2006, supplemental brief in opposition of suppression conceded that Fiasche's enclosed backyard was subject to Fourth Amendment constraints. The government's filing included:

> Fourth Amendment protection has also been extended to the "curtilage" of the home which,

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1. Vitagliano's arrest and the search of his vehicle are not before the Court within the contours of this petition.

> in this instance, would included the walled and fenced area of the back yard, adjacent to the home, which FIASCHE may have reasonably expected would remain private.

R. 46, at p. 11.

The district court memorandum opinion rejecting petitioner's Fourth Amendment importunings acknowledged that [his] backyard "was a protected area." R. 51 at p. 15, App. 32. The opinion then held that Agent Oko's entry was justified because (1) agents were in the process of contacting [knock and talk] the home occupants, (2) the house had been accurately described by the informant [Bjerga], (3) the house had contained drugs at some point, and (4) Vitagliano had drugs when he was stopped. Regarding Agent Oko (5) he heard "the noise," and thought that someone exited the house, (6) when he ran back and saw a broken screen he heard a flush and learned that contact had been made in front, (7) he heard another flushing "accompanied" with the understanding that the occupants knew the police were present–which created exigent circumstances. R. 51 at p. 15, App. 32. Furthermore, while rejecting suppression the district court held:

> In this case, by comparison the authorities did not believe there to be exigent circumstances at the outset and instead opted to try the knock and talk approach. It was only when Oko heard what he thought might be someone trying to escape that he entered a protected

> area. That entry, as noted, was proper because of exigent circumstances.

R. 51, p. 16, n. 4. App. 33 at n. 4.

On March 21, 2008, the court of appeals affirmed. Circuit Judge Evans' opinion for the court acknowledged that warrantless home searches are presumptively unreasonable and the government bears the burden of proving that it had an objectively reasonable belief that exigent circumstances existed at the time of the warrantless entry. App. 10-11. With that preface the court, in a single paragraph, affirmed suppression denial. App. 10-11.[2]

REASONS FOR GRANTING THE PETITION

1. *Brigham City, Utah v. Stuart*, 547 U.S. 398 (2006) provides sound precedent regarding warrantless home entries where police intervention concerned an occupant's health, safety or welfare. But the lower courts, before and after *Brigham City*, remain divided regarding warrantless entries not involving home occupants' safety or welfare, because the Court's pre-*Brigham City* cases demand *probable cause plus exigent circumstances* justifying warrantless–home encroachment–arrests and evidence-seizures. Compare *United States v. Snipe*, 515 F.3d 947 (9th Cir. 2008) (rejecting suppression where exigent circumstances supported warrantless home entry, citing *Brigham*

2. Since the government conceded, and the district court accepted, that petitioner's enclosed backyard comprised home-curtilage, petitioner pretermits curtilage-Fourth Amendment authorities.

City), with *United States v. Mowatt*, 513 F.3d 395 (4th Cir. 2008) reversing district court suppression denial–where police created exigent circumstances), and *United States v. Reeves*, 524 F.3d 1161 (10th Cir. 2008) (affirming suppression while rejecting exigent circumstances in connection with warrantless entry into defendant's motel room) (*Brigham City* was not cited in either *Mowatt* or *Reeves*).

Moreover, the lower courts remain divided regarding whether police or federal agents can "create" exigent circumstances justifying the warrantless entry into citizens' homes.

A. PRE-*BRIGHAM CITY* PRECEDENTS: In *Johnson v. United States*, 333 U.S. 10, 13-14 (1948), Justice Jackson's eloquent suppression opinion supported the proposition that "zealous" officers seldom grasp the importance of the Fourth Amendment. 333 U.S. at 13;[3] *cf. Spinelli v. United States*, 393 U.S. 410, 415 (1969) ("... probable cause must be determined by a neutral and detached magistrate, and not by the officer engaged in the often competitive enterprise of ferreting out crime.") (quotation marks and supporting citation omitted). Shortly after *Johnson*, Justice Douglas authored the Court's opinion in *McDonald v. United States*, 335 U.S. 451 (1948), where the Court reversed gambling convictions because police, without a warrant, entered rooms in a home where the gambling enterprise was operating. While finding for the petitioner, Justice Douglas explained:

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3. *Johnson v. United States, ante*, was cited, with approval within Justice Stewart's reversing opinion in *Mincey v. Arizona*, 437 U.S. 385 at 395 (1978).

> *Power is a heady thing; and history shows that the police acting on their own cannot be trusted. And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home. We cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative.*

445 U.S. at 455-56 (ital. emph. added).

The guidance provided in *Johnson* and *McDonald* served as the backdrop for subsequent Fourth Amendment decisions, including *Payton v. New York*, 445 U.S. 573 (1980), where the Court explained:

> The Fourth Amendment has drawn a firm line at the entrance to the house, a threshold which police officers may not cross without a warrant.

445 U.S. at 589 (quotation marks omitted).

In Welsh v. Wisconsin, 466 U.S. 740, 748 (1984), the Court explained: "it is axiomatic that the physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." (supporting citation omitted). *Welsh* also explained that the government has [a] "heavy burden" justifying the warrantless entry. 466 U.S. at 749-50 ("Prior decisions of this Court, however, have emphasized that exceptions

to the warrant requirement are few in number and carefully delineated, * * * and that the police bear a *heavy burden* when attempting to demonstrate an urgent need that might justify warrantless searches or arrests") (ital. emph. added, internal quotation marks and supporting citations omitted). Recently, in *Kirk v. Louisiana*, 536 U.S. 635 (2002) (*per curiam*), the Court reversed drug convictions where police, absent any warrant, entered an apartment, seized drugs and arrested *Kirk*. On review, the Court, explained:

> We held that because the Fourth Amendment has drawn a firm line at the *entrance of the house*... [a]bsent exigent circumstances, that *threshold* may not reasonably be crossed without a warrant. * * * . *As Payton makes plain, police officers need either a warrant or probable cause plus exigent circumstances in order to make a lawful entry into a home.*

536 U.S. at 638 (emph. added).

In the ensemble, *Payton*, *Welsh* and *Kirk* recount settled Fourth Amendment principles which include (1) warrantless home searches are presumptively unreasonable, and (2) to enter a home the police must have a warrant, or probable cause *plus* exigent circumstances; and (3) the government has [a] "heavy burden" of justifying the warrantless entry.[4]

4. The lower courts are divided regarding the pre-*Brigham City* exigent circumstances standard of review. Compare *United States v. Turner*, 650 F.2d 526, 528 (4th Cir. 1981) (exigent circumstances reviewed for clear error); *United States v.* (Cont'd)

Here the warrantless entry into petitioner's home was presumptively unreasonable, probable cause *plus* exigent circumstances were non-existent, and the government failed to meet this "heavy burden" while seeking to justify the armed intrusion into petitioner's curtilage/home. And, to be sure, "A search prosecuted in violation of the Constitution is not made lawful by what it brings to light. . . ." *Byars v. United States*, 273 U.S. 28, 29-30 (1927).

The agents had been monitoring petitioner's home for two or more hours–and certainly–they had ample time to seek [a] telephone search warrant. *See* Fed. R. Crim. P. 41(d)(3)(A) (authorizing telephone search warrants–which according to Circuit Judge Posner in *United States v. Collins*, 510 F.3d 697, 698 (7th Cir. 2007), can be obtained within minutes either by telephone or e-mail). The record is silent regarding whether the DEA agents requested a telephone search warrant–they may have abstained seeking judicial authorization because probable cause for a search warrant was untenable, *see Whiteley v. Warden*, 401 U.S. 560, 566 (1971) ("standards applicable to the factual basis supporting the officer's probable-cause assessment at the time of the challenge arrest and search are *at least as stringent as the standard applied with respect to the magistrate's assessment*") (ital. emph. added and parallel citation omitted).

(Cont'd)

Blount, 123 F.3d 831, 837 (5th Cir. 1997) (same) with *United States v. Goree*, 365 F.3d 1086, 1090 (DC Cir. 2004) (exigent circumstances determinations review *de novo*); *United States v. Tibolt*, 72 F.3d 965, 969 (1st Cir. 1995) (same); *United States v. Gaitan-Acevedo*, 148 F.3d 577, 585 (6th Cir. 1998) (same); *United States v. VonWillie*, 59 F.3d 922, 925 (9th Cir. 1995) (same).

The totality of information/contemporaneous events failed to reveal any hint of danger or weapons. Tr. 158. The nebulous information provided by Bjerga included innocent details such as a description of petitioner's home, phone number and the car he usually drove.[5] The informant also related that on an uncertain date a black Lexus (or a rented car) would ferry a large sum of U.S.C. from Chicago to New York. Tr. 4-6, 39. The sole intervening occurrence related to the arrest of Vitagliano with 200 Ecstacy pills, [a] "knock and talk" resulting in momentarily seeing a man–covered with a towel– who responded "hold on" or some such thing. Finally, Agent Oko heard an otherwise undefined "swishing" sound emanating from petitioner's backyard. Tr. 179-80. Petitioner asserts that the composite information and events failed to rise to the level of *probable cause plus exigent circumstances* justifying the warrantless entry into petitioner's protected

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5. The lower courts hold that corroboration of readily available information (innocent details) fails to establish the reliability of informant-information, *see United States v. Rasor*, 599 F.2d 1330, 1332 (5th Cir. 1999) (holding that corroboration of information that was readily available to many persons does not demonstrate reliability) (quotation marks omitted); *United States v. Mendonsa*, 989 F.2d 366, 369 (9th Cir. 1993) ("mere confirmation of innocent static details is insufficient to support an anonymous tip"); *United States v. Gibson*, 928 F.2d 250, 252-53 (8th Cir. 1991) (insufficient showing of probable cause when officer only corroborated innocent details of utility records for account name, revenue agency for physical description, and car titles, and there was neither surveillance nor observation of unusual civilian or vehicular traffic at the address * * * .) (quotation marks omitted); *United States v. Weaver*, 99 F.3d 1372, 1379 (6th Cir. 1996) (same), *Sira v. Morton*, 380 F.3d 57, 79-80 (2nd Cir. 2004) (same-collecting cases).

curtilage/home. And, in all events, Agent Oko testified that after the first flushing sound–he made the "determination" that "they" were going into petitioner's home. *Id.* at 156.

Petitioner contends that while *Brigham City* provides a reasonable approach to circumstances where police have objectively reasonable grounds for the warrantless entry into a home–where an occupant's safety or welfare demands swift action, the same police objectivity is absent where zealous federal agents execute a warrantless entry, without both probable cause plus exigent circumstances. This petition provides a pristine vehicle to resolve vexing Fourth Amendment questions arising from warrantless home entries where there is no hint of the need to come to the aid of anyone because of health or safety concerns.

B. BEFORE AND AFTER *BRIGHAM CITY* THE LOWER COURTS REMAIN DIVIDED REGARDING WARRANTLESS HOME ENTRIES BASED ON EXIGENT CIRCUMSTANCES AND WHETHER THE POLICE CAN "CREATE" CIRCUMSTANCES JUSTIFYING WARRANTLESS ENTRIES.

In *United States v. Snipe*, 515 F.3d 957 (9th Cir. 2008), the court affirmed suppression rejection where police, acting without a warrant, entered *Snipe's* home following an early morning call urging the police to come to the home "now." 515 F.3d at 949. On arrival, they knocked on the door, it opened and upon entering they saw several individuals sitting around a kitchen table. One asked why the police were there, and responding to police questions stated that no one was "hurt." While

in the apartment the officers saw drugs in open view, but finding no emergency they left and promptly obtained a search warrant. *Id.* at 949-50. Following execution of the search warrant the police recovered drugs and a weapon. *Id.* at 950. After *Snipe's* suppression motion was denied, he appealed contending that the warrantless entry violated the Fourth Amendment.

The Ninth Circuit affirmed the district court explaining, *inter alia,* that after *Brigham City,* the pertinent questions–considering the entire record–[are] whether the circumstances, viewed objectively, justified the action . . . and whether "the manner of the officers' entry was also reasonable." *Id.* at 951 (quoting *Brigham City*). The *Snipe* court explained that the subjective motivations of the police are "irrelevant to determining whether such entries are justified," and "*Brigham City* failed to conduct any traditional probable cause inquiry." *Id.* at 951-52 (quotation marks added). *Snipe* continued: "Instead, the Court assumed that probable cause to associate the emergency with the place to be searched exists whenever law enforcement officers have an objectively reasonable basis for concluding that an emergency is unfolding in that place." 515 F.3d at 952 (quotation marks ours).

The *Snipe* court, citing *United States v. Holloway,* 290 F.3d 1331, 1338 (11th Cir. 2002) and *Koch v. Brattleboro,* 287 F.3d 162, 169 (2nd Cir. 2002), explained that "in an emergency, the probable cause element may be satisfied where officers reasonably believe a person is in danger." *Id.* at 952 (quotation marks in original). Importantly, in *Snipe,* there was an early morning call

to the police for "help" which served as the predicate for the police presence at the home. Hence, by extension, the *Brigham City* "exigent circumstances" doctrine applied because of the antecedent telephone call requesting "help" [now]. 515 F.3d at 949.

In stark contrast to *Snipe* and *Brigham City*, the recent decisions in *United States v. Mowatt*, 513 F.3d 395 (4th Cir. 2008), and *United States v. Reeves*, 524 F.3d 1161 (10th Cir. 2008), are instructive regarding drug and weapon investigations where the government relies on exigent circumstances in support of warrantless arrests and seizures. In *Mowatt*, police officers were dispatched to an apartment in a high-crime area because of loud music and marijuana odors. When they arrived at *Mowatt's* apartment they knocked several times–he refused to open the door. When he finally opened the door *Mowatt* held his right hand behind his back. The officers, being concerned for their safety, pushed their way in and, after a struggle, eventually subdued *Mowatt*. During the struggle a refrigerator door opened and the police saw drugs in plain view. They later obtained a search warrant and recovered weapons and drugs. 513 F.3d at 397-98. *Mowatt* was charged with federal drug and weapon offenses and, post-indictment, his motion to suppress was denied. The Fourth Circuit reversed, finding, *inter alia*, that the exigent circumstances which led to the initial warrantless entry and subsequent search warrant were the result of exigent circumstances "created" by the police. While finding that *Johnson v. United States*, 333 U.S. 10 (1948), informed its analysis, the *Mowatt* court explained that the officers had the option of leaving the probable cause determination to a magistrate and needed only "to seek a warrant before

confronting the apartment's occupants. By not doing so, they set up the wholly foreseeable risk that the occupants, upon being notified of the officers' presence, would seek to destroy the evidence of their crime." 513 F.3d at 402 (quotation marks added, n 8 omitted). Regarding "creating" exigent circumstances, the court cited, with approval, decisions from the Third, Fourth, Fifth, Eighth and Eleventh Circuits–each holding, in part, that law enforcement authorities may not "create" exigent circumstances in order to bypass the Fourth Amendment's warrant requirements.[6]

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6. The *Mowatt* court, 513 F.3d at 403, cited the following decisions in connection with "creating" exigent circumstances. *See United States v. McCraw*, 920 F.2d 224, 230 (4th Cir. 1990) (holding that no exigency justified officers' warrantless entry * * * "[a]ny risk of the destruction of evidence . . . was precipitated by the agents[ ] themselves when they knocked on the door"); *United States v. Collazo*, 732 F.2d 1200, 1204 (4th Cir. 1984) ("The government will not be allowed to plead its own lack of preparation to create an exigency justifying warrantless entry."); *United States v. Coles*, 437 F.3d 361, 370 (3d Cir. 2006) ("[I]n order to determine whether the police impermissibly manufacture or create exigent circumstances, we must look to the reasonableness and propriety of their actions and investigative tactics preceding their warrantless entry." (emphasis in original omitted)); *United States v. Gould*, 364 F.3d 578, 590 (5th Cir .2004) (*en banc*) (similar); *United States v. McGregor*, 31 F.3d 1067, 1069 (11th Cir. 1994) (similar); *United States v. Duchi*, 906 F.2d 1278, 1284-85 (8th Cir. 1990) (similar); *United States v. Paul*, 808 F.2d 645, 647 (7th Cir. 1986) (similar).

Further, in *United States v. Troop*, 514 F.3d 405, 410-11 (5th Cir. 2008) (the reversing court similarly held that the government may not "create" exigent circumstances in order to avoid warrant requirements).

In *United States v. Reeves*, 524 F.3d 1161 (10th Cir. 2008), the court reversed firearm convictions while considering exigent circumstances *vel non* . The *Reeves* facts revealed that police officers from Carbon County, Wyoming, responded to an assault investigation at around 9:30 p.m. on March 13, 2005. A liquor store clerk told the officers she heard comments earlier that day from *Reeves*: "sometimes you gotta do what you gotta do and God tells you what to do." 524 F.3d at 1164. Several hours later, police officers went to a local motel where *Reeves* had lived for about three months. *Reeves* was called by motel personnel but did not answer, and the police went to his room. After twenty minutes of banging on his door, *Reeves* opened the door, exited the room wearing a gun holster in open view. He was arrested and a "protective sweep" of the room revealed weapons in plain view. *Id.* at 1164. *Reeves* later executed a search consent form and the weapons were seized. The district court denied his motion to suppress and on appeal the Tenth Circuit reversed. Initially, citing *Payton v. New York* and *Kirk v. Louisiana*, *ante*, the court explained that the police may not enter a home without consent to make a warrantless routine felony arrest even with probable cause, and the Fourth Amendment has drawn a firm line at the entrance to the house. *Id.* at 1165. Regarding knock and talk/exigent circumstances, the court noted that an encounter in the house could not be considered investigatory because it would render "*Payton's* requirements" meaningless because *Payton* applies to all seizures. *Id.* at 1166. The Tenth Circuit reasoned:

> That *Payton* applies to all warrantless seizures in the home is the only logical outcome. If we were to hold otherwise, it would allow a seizure in the home when only reasonable suspicion

> exists, yet prohibit a seizure in the home when an officer has probable cause to arrest, but no exigent circumstances. It cannot be the case that *Payton*'s firm line at the entrance to the house offers less protection to individuals for whom probable cause to arrest does not exist. 445 U.S. at 576.

524 F.3d at 1167 (itals. in original, quotation marks omitted). The Tenth Circuit also cited *United States v. Mowatt*, *ante* ("A factor that develops post-seizure cannot be used to justify exigency."). 524 F.3d at 1170.

Petitioner urges that the Court embrace the reasoning of the Fourth and Tenth Circuits in *Mowatt* and *Reeves*.[7] Neither cited *Brigham City* within the

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7. Additional pre-*Brigham City* decisions addressing "creating" and explaining exigent circumstances include *United States v. Vega*, 221 F.3d 789, 798-99 (5th Cir. 2000) (following knock and talk/announce defendant ran out of the backdoor of his home where he was arrested; court found for the defendant holding that "exigent circumstances" are determined before defendant was aware of the officers presence at the home); *United States v. Chambers*, 395 F.3d 563, 565-66 (6th Cir. 2005) (affirming suppression finding that warrantless home entry not justified by exigent circumstances–knock and talk analysis, citing *McDonald v. United States*, *ante*); *United States v. Coles*, 437 F.3d 361, 366-67 (3rd Cir. 2006) (police created exigent circumstances; divided court reversed suppression denial, citing, *inter alia*, *Johnson v. United States*) ("We read *Johnson* as focusing the Fourth Amendment inquiries upon the reasonableness and propriety of the actions taken by the police *preceding* the warrantless search. That inquiry is also essential in the police created-exigency context."); *United States v. Morgan*, 743 F.2d 1158, 1163 (6th Cir. 1984) (police are not free to create exigencies to justify warrantless intrusions).

fabric of their respective Fourth Amendment analyses. Thus, petitioner advances that *Brigham City* is necessarily limited to emergency (exigent) circumstances where police are responding to situations where those in a home are in need of immediate police help.

In stark contrast to *Brigham City* and *Snipe*, petitioner's case does not involve any call to the DEA for to provide assistance or aid to an occupant in petitioner's home. Rather, petitioner's case is analogous to *Johnson* and *McDonald*, and the Fourth and Tenth Circuit decisions in *Mowatt* and *Reeves* where the police "created" the exigent circumstances by performing a "knock and talk." Here the "knock and talk" resulted in DEA agents seeing a towel-clad man retreat to the rear of his home. Stated otherwise, rather than taking a few moments to seek a telephone warrant pursuant to Fed. R. Crim. P. 41(d)(3)(A), *et seq.*, the federal agents decided that their warrantless "encroachment" would be sustained by the lower courts irrespective of the Fourth Amendment. But as Justice Jackson explained in *Johnson v. United States*–decades before the availability of telephone or e-mail search warrants:

> No reason is offered for not obtaining a search warrant except the inconvenience to the officers and some slight delay necessary to prepare papers and present the evidence to a magistrate.

333 U.S. at 14.[8]

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8. *See also* 4 LaFave, Search and Seizure, § 6.5(b), pp. 399-400 and n. 50 (2004) (collecting cases).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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